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No. 82-1334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CEDAR POINT INVESTMENT CORPORATION, *et. al.*,
Petitioners,

v.

CEDAR POINT APARTMENTS, LTD.,
a limited partnership,
by JOHN G. ARIKO, its general partner,
Respondent.

and (Consolidated with)

B & D INVESTMENT CORPORATION, *et. al.*,
Petitioners,

v.

WELLINGTON GREEN APARTMENTS, LTD.,
a limited partnership
and ANTHONY J. NICHOLSON, as general partner,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that the Court deny this Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Eighth Circuit entered in this action November 17, 1982.

STATEMENT OF THE CASE

While detailed statements of the facts of this case are contained in the opinions of the District Court and the Eighth Circuit Court of Appeals, included in the appendix of this Brief, Respondent would like to summarize the present posture of the case to clarify Petitioner's Statement of the Case. It must be remembered that the purpose of this brief is to address Petitioner's application for a Writ of Certiorari, it is not intended as a brief on the merits of this case.

This case involves two suits, which were consolidated in the District Court, concerning contracts for the sale of two (2) apartment complexes known as the Wellington Green Apartments and the Cedar Point Apartments in St. Louis, Missouri. Petitioners are the original Defendants (herein Sellers). Sellers employed DRG Financial Corporation to act as their agent to find a purchaser for the properties and to process an application for FHA financing under the 223 (F) program. (FOF No. 17 App. p. A-34).[1] Respondents (herein Purchasers) were the prospective purchasers of the properties.

In January, 1979, Sellers entered into a contract for the sale of the Wellington Green Apartments and the Cedar Point Apartments to Respondents. After prolonged and complicated transactions between the Sellers, their agent DRG, and Purchasers, negotiations broke down and on June 14, 1979 Sellers declared Purchasers in default and on June 18, 1979 the Sellers terminated their relationship with DRG.

Purchasers brought the original action in this case on August 17, 1979 seeking specific performance of the contracts, damages equal to additional financing costs, actual damages for breach

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[1]References to various paragraphs in the Findings of Fact of the District Court will be denominated as "FOF ____".

of contract, and actual and punitive damages for tortious interference with the contracts and conspiracy to interfere with the contracts.

Trial was held, without a jury, before the Honorable James H. Meredith, United States District Judge. On October 30, 1981, the District Court dismissed both actions with prejudice after making Findings of Fact and Conclusions of Law. (District Court's opinion is attached as Appendix B App. p. A-23). The District Court held that Plaintiffs lacked standing to bring the suit and further that Sellers only partially waived Purchasers initial breach of the contract and that the extension of FHA loan committments did not extend the closing date of the contract. The District Court held that Purchasers breached the contract and Sellers declaration of default on June 14, 1979 was correct.

Purchasers appealed to the Eighth Circuit Court of Appeals. The Court of Appeals, on November 17, 1982, reversed the decision of the District Court. Specifically, the Court of Appeals held that the Respondent Purchasers had standing to bring the original suit and that Sellers' acceptance of Purchasers' earnest money deposit was a complete waiver of Purchasers' initial breach of the contract and that DRG acted as agent for sellers in extending the date of the expiration of the FHA firm loan committments which automatically extended the contract closing date. Therefore, Sellers wrongfully repudiated the contracts by declaring Purchasers in default on June 14, 1979.

Petitioners now seek a Writ of Certiorari, on the grounds that the Court of Appeals violated the "clearly erroneous" standards of Rule 52(a), Federal Rules of Civil Procedure.

REASONS FOR DENYING THE WRIT

I.

The Court Of Appeals Did Not Exceed The Scope Of Rule 52(a) FRCP In That Its Decision Concerns Matters Of Law And A Finding By The District Court That Is "Clearly Erroneous".

Petitioners assert that the Eighth Circuit is "still applying the *Strecker* standard" which provided that an "ultimate fact" was independently reviewable by the Appellate Court regardless of Rule 52. An Eighth Circuit panel has recently stated that *Strecker* has been implicitly overruled by *Pullman-Standard* v. *Swint,* 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982). *Robino* v. *Norton,* 682 F. 2d 192, 195 (1982). There is nothing in the Court of Appeals decision, attached hereto as Appendix A (App. p. A-1) to indicate that the Court was still following *Strecker.* Certainly Judge Lay must be presumed to be aware of the recent decision of the Eighth Circuit in *Robino* even though he did not participate. Nowhere does the Court of Appeals refer to either "ultimate" or "subsidiary" facts but it abides by the "clearly erroneous" standard except as to matters of law which they may freely review. *Spielberg Mfg. Co.* v. *Direct Sales Intern, Inc.,* 566 S.W. 2d 839 (Mo.App. 1978); *Murphy* v. *Carron,* 536 S.W. 2d 30 (Mo. en banc. 1976); Wright & Miller, Federal Practice and Procedure: Civil Sec. 2588.

II.

Whether The Plaintiff Possessed Standing To Sue Was A Matter Of Law And Could Therefore Be Freely Reviewed By The Appellate Court.

The Court of Appeals, referring only to the language of the underlying contracts for sale and to case law and treatises held that the Purchasers, Plaintiffs below and Respondents herein, were the real parties in interest by reason of valid assignments of

the sale contracts and therefore possessed standing to sue. Those persons entitled to maintain a suit is a matter of law. *State ex rel. Schneider* v. *Stewart,* 575 S.W. 2d 904 (Mo. App. 1978), *Mackey* v. *Randolph Macon Coal Co.,* 178 F. 881 (C.C.A. Mo. 1910). Therefore, from a reading of the plain language of the contract the Court of Appeals could determine as a matter of law that the contract allowed assignment to the named plaintiffs who were the real parties in interest. The appellate court is free to review the language of the contract as the interpretation of an unambiguous contract is a matter of law. *Harber* v. *Ohio Nat. Life Ins. Co.,* 512 F. 2d 170 (8th Cir. 1975); *Slotkin* v. *Willmering* 464 F. 2d 418 (8th Cir. 1972); *Commerce Trust Co.* v. *Howard,* 429 S.W. 2d 702 (Mo. 1968). The parties in this suit have not asserted that the language of the contract was ambiguous. Even had such an assertion been made, the question of whether an ambiguity exists is also one of law which the appellate court could fully consider. *Harris* v. *Union Electric Co.,* 622 S.W. 2d 239 (Mo. App. 1981); *Weltscheff* v. *Medical Center of Independence, Inc.,* 604 S.W. 2d 796 (Mo. App. 1980); *Busch & Latta Painting Corp.* v. *State Highway Commission,* 597 S.W. 2d 189 (Mo. App. 1980).

III.

Whether Sellers' Acts Amounted To A Waiver Of Purchasers' Initial Breach Was A Matter Of Law Properly Reviewed By The Court Of Appeals.

The District Court clearly found that the Purchasers' checks were received, cashed and held by DRG Financial Corporation up to and until December 5, 1979 (FOF #27 App. p. A-36). The District Court also found that Donald Ham (Seller) instructed his agent to continue working toward a closing of the contracts. (FOF #28 App. p. A-37). The District Court found that these facts amounted to a "partial waiver" by Sellers of Purchasers' breach. (FOF #28 App. p. A-37). The determina-

tion of the legal significance of Sellers' acts was in truth a conclusion on a matter of law. The Court of Appeals rightfully determined, *from these same facts* that the acts of the Sellers in accepting Purchasers' late payment and proceeding toward closing amounted to a *complete waiver,* as a matter of law. Whether certain facts amount to a waiver is a question for law and is properly reviewable by an appellate court. *S.S. Silverblatt, Inc.* v. *Seaboard Surety Co.,* 417 F. 2d 1043, 1055 (8th Cir. 1969). The Court of Appeals determined that a legal waiver had taken place without violating any facts found by the District Court and without substituting its own factual determinations.

IV.

The Court Of Appeals Was Not In Error In Determining That DRG Was Acting As Agent For Sellers In Obtaining An Extension Of The FHA Committments.

The District Court found that Sellers employed DRG as their agent on January 12, 1978 for *all* phases of application for FHA loan committments. (FOF #17 App. p. A-34).

The District Court made *no* additional findings regarding the agency relationship between Sellers and DRG. The only conclusion that can follow in the face of such findings by the District Court, who heard the evidence and could have made additional findings, is that DRG was still operating as Sellers' agent when it obtained the FHA extensions. For the District Court to find only that DRG was hired as an agent and imply that it was not an agent at a subsequent time is clearly erroneous and violates its own findings of fact. Where the facts are not in dispute the existence of an agency is a matter of law. *Baker* v. *St. Paul Fire & Marine Ins. Co.,* 427 S.W. 2d 281 (Mo. App. 1968). The Court of Appeals did not disturb the District Court's finding of an agency relationship.

In order to avoid making additional findings regarding the agency relationship, the District Court simply stated that the acts of DRG did not extend the closing date of the contract. (FOF #31 App. p. A-37). In making such a finding the District Court was interpreting the plain language of the contract and making conclusions of law and the Court of Appeals was free to substitute its own, more correct interpretation of the contract and law; i.e. that the acts of DRG did not extend the closing date of the contract. *S.S. Silverblatt, Inc.* v. *Seaboard Surety Co.*, 417 F. 2d 1043 (8th Cir. 1969).

V.

Petitioner Is Not Entitled By Virtue Of Rule 17 To Another Review Of The Facts Through The Guise Of Certiorari Review.

It is clear from the foregoing, a response to Petitioner's complaints, that Petitioner is merely seeking another review of the facts and evidentiary questions peculiar to this case alone. In reality, Petitioner is hoping that this court, through certiorari will again review the law applicable to the facts as found by the District Court.

The areas of the law considered by the lower courts; standing, waiver, agency, and interpretation of contracts, are not of such import as to warrant review by this court and none of these areas fall within the purview of Rule 17.

The Petitioner is obviously unhappy with the Court of Appeals' interpretation of the law. However, the Court of appeals herein has not rendered a decision in conflict with the decision of another federal court of appeals on the same matter. The Court of Appeals herein has not departed from the appropriate standard of review as stated in Rule 52. Nothing in the Court of Appeals decision warrants exercise of this court's power of supervision.

The Petition cannot be said to allege that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, nor can it be said to allege that the court of appeals has decided a federal question contrary to applicable decisions of this court. See Rule 17.1(a)(c), Revised Rules of the Supreme Court of the United States.

CONCLUSION

The Petition asks this court to exercise its discretionary jurisdiction in order to consider a case that has been fully considered by the district court and the court of appeals. Petitioner seeks review of factual issues and evidentiary rulings peculiar to this case and conclusions regarding matters of law which, while important to the parties herein, are of no monumental significance to this court. Consideration by this court would amount to a review of the Court of Appeals application and interpretation of general principles of law and that is not the purpose for which a writ of certiorari was intended.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2413

Cedar Point Apartments, Ltd., a limited partnership by John G. Ariko, its general partner,

Appellant,

v.

Cedar Point Investment Corp., a Missouri corporation and William Bruce and Donald Ham; Donn H. Lipton; Robert B. Millard; McDonnell Douglas Corp.; Christina Ferer Millard; Patricia Ferer; Gershman Investment Corp.; Community Federal Savings & Loan,

Appellees.

Welling Green Apartments, Ltd., a limited partnership and Anthony J. Nicholson as general partner,

Appellant,

v.

B & D Investment Corporation; William Bruce; Donald Ham; Donn H. Lipton; Robert B. Millard; McDonnell Douglas Corp.; Christina Ferer Millard; Patricia Ferer; Missouri Savings Association,

Appellees.

Submitted: June 14, 1982

Filed: November 17, 1982

Appeal from the United States District Court
for the Eastern District of Missouri

Before LAY, Chief Judge, JOHN R. GIBSON, Circuit Judge, and FAIRCHILD,* Senior Circuit Judge.

LAY, Chief Judge.

This appeal involves a consolidation of two actions involving breach of contracts, tortious interference with contracts, and conspiracy to tortiously interfere with contracts for the sale of two apartment complexes. The district court, the Honorable James H. Meredith presiding, dismissed both cases on the grounds that the plaintiff-purchasers lacked standing to sue or, in the alternative, that plaintiffs initially breached the contracts and therefore could not recover damages for any breach by the defendant-sellers. 527 F. Supp. 602, 609-10 (E.D. Mo. 1981). We reverse; we hold that the plaintiffs have standing to sue, and that under the evidence presented they are entitled to recover for the sellers' breach of the contracts.

Facts.

Donald Ham and William Bruce, owners of the Wellington Green Apartments and the Cedar Point Apartments, employed BRG Financial Corporation in 1978 to act as their agent in all phases of application for F.H.A. Mortgage Insurance Commitments and to act as F.H.A.-approved mortgagee in processing F.H.A. insured loans on the two apartment complexes. DRG was additionally retained by Ham and Bruce as a broker and was given the exclusive right to sell both complexes. In the fall of 1978, Anthony Nicholson and John Ariko, through

* Thomas E. Fairchild, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

DRG, began preliminary negotiations with Ham and Bruce for the purchase of the properties. In January 1979 two contracts drafted by DRG were executed. Each contract required the purchasers to make a $20,000 earnest money deposit in the form of an irrevocable letter of credit in favor of the sellers no later than January 30, 1979.

On February 12, 1979, Nicholson sent two personal checks totalling $40,000 to DRG with instructions not to deposit until further authorization; Nicholson also advised DRG that he was arranging a bank letter certifying availability of funds for the checks. On March 8, 1979, the Florida National Bank sent DRG a letter stating that Nicholson had a line of credit with the bank to provide for the $40,000 advance and setting forth a method of payment in the event of insufficient funds for Nicholson's checks. On May 10, 1979, the sellers sent a mailgram to DRG which declared that the Florida bank letter did not meet the contractual requirements and instructed DRG to obtain compliance by May 16, 1979. DRG notified Nicholson that he must tender a $40,000 certified check or an irrevocable letter of credit by May 16. On May 15 Nicholson responded with a mailgram protesting the demand and claiming that the bank letter complied with the contract provisions; on May 17, however, he again mailed two personal checks totalling $40,000 to DRG.

Upon receipt of the checks DRG informed Ham of the payment; Ham instructed DRG to continue to work toward a closing under the two contracts. DRG cashed the checks and held the proceeds.

Each contract provided that a substantial portion of the purchase price was to be funded by secured notes insured by the F.H.A. The F.H.A. commitments to insure this primary funding were scheduled to expire ninety days after they were granted, or on June 14, 1979; closings on the sales of the apartments were contractually designated to occur contemporaneously with the closings on the F.H.A.-insured loans. On

June 8, 1979, with various preliminary contractual duties of both parties still incomplete, DRG requested a thirty-day extension from the F.H.A. on the commitments. The request was granted thereby extending the expiration of the commitments to July 16, 1979.

On June 8, 1979, Nicholson, who had been designated as the purchaser under the contracts, executed written assignments of all his rights in the two sales contracts to two limited partnerships. He was the general partner of one partnership, Wellington Green Apartments, Ltd.; John Ariko was the general partner of the other partnership, Cedar Point Apartments, Ltd. Ham, Bruce, Nicholson, and Ariko had previously agreed that the contracts would be assigned to two Florida limited partnerships to be formed by Nicholson and Ariko.

On June 12, 1979, Ham demanded fifteen days prior notice of the actual closing date, claiming that the contract required such notice; an attorney for the purchasers responded the next day with a letter specifying a June 29, 1979, closing date. On June 14, the sellers, who had not yet received the attorney's letter specifying a June 29 closing or DRG's notification of the thirty-day commitment extensions, appeared for closing at the F.H.A. offices. Later that same day, the sellers gave DRG written notice of immediate termination of both contracts on the ground that the purchasers had defaulted. The sellers demanded receipt of the $40,000 deposit as liquidated damages.

On June 18, 1979, the sellers discharged DRG as their agent. DRG asked Don Ham to suggest some way that the two apartment deals could be closed; in response, the sellers began immediate but unsuccessful renegotiations with the purchasers for the sale of the same properties at a higher price. Neither party appeared for the scheduled June 29 closing, and the F.H.A. commitments expired on July 16, 1979.

The two limited partnerships brought these actions on August 17, 1979, seeking specific performance of the contracts, damages equal to additional financing costs, actual damages for breach of contract, and actual and punitive damages for tortious interference with the contracts and conspiracy to interfere with the contracts. Each of the apartment complexes involved in the dispute was sold to third parties after the suits had been filed and the issue of specific performance was essentially abandoned at trial. The case was tried before the court for a week, and the district court judge ultimately dismissed both actions with prejudice. The partnerships now appeal contending that certain findings of the district court are clearly erroneous and that the trial court improperly concluded that they lack standing to sue.

Standing: The Restrictions on Assignment.

The contracts contain virtually identical provisions, including those relevant to the assignment issue. Each contract stipulates that it was entered into between the sellers and "ANTHONY J. NICHOLSON and/or ASSIGNS (hereinafter referred to as 'Purchaser')." Paragraph 21 of each contract provides: "The principals to this Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors, and assigns." Paragraph 28 of each agreement is an assignment clause which states:

> Purchaser shall have the right to assign this Agreement to any partnership of which [sic][1] is a general partner; provided, however, that Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform and discharge each and every obligation and liability of Purchaser set forth in this Agreement.

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[1] When the district court quoted this paragraph in its opinion, it apparently overlooked the contracts' omission of a word or words here, and inserted the word "it" where the omission appeared.

The district court held that the assignments of the contracts to the limited partnerships by Nicholson were void. The court found that the assignments were invalid on the grounds that paragraph 28 of each contract contained two express limitations on the power to make assignements which were not complied with: (1) Nicholson had not obtained a written assumption of duties from the assignee partnerships as mandated; and (2) Nicholson was merely a limited partner, not a general partner, of one of the partnerships. We respectfully must disagree. We hold that the assignments were valid. In construing paragraph 28 of the contracts, we hold as a matter of law that this paragraph serves only as a restriction on the delegation of duties, and not on the assignment of rights. Furthermore, even if it is argued that paragraph 28 was intended to affect the assignment of rights, the *power* to assign in violation of the restrictions is not affected by any stipulation in the contracts.

The provision in paragraph 28 of each contract that "Purchaser shall have the right to assign this Agreement" is an expressly permissive,[2] not prohibitive, form of assignment clause.

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[2] The clause indicates the intent of the sellers and the broker-mortgagee DRG to permit the delegation of the otherwise nondelegable duty of tendering promissory notes. Such a nondelegable duty is nevertheless delegable with or without an assignment of rights if the obligee-seller consents. *See* 4 A. Corbin, *Corbin on Contracts* § 865, at 445-46, § 870, at 475-76 (1951); J. Calamari and J. Perillo, *The Law of Contracts* §§ 18-25, -28 (2d ed. 1977); 3 S. Williston, *A Treatise on the Law of Contracts* §§ 411,411A (3d ed. 1960); Restatement (Second) of Contracts § 318(2) & comment c (1981).

The consent granted in paragraph 28 by the sellers and the mortgagee to the purchasers permitted delegation of the purchaser's duties to certain partnerships; however, in addition to delegation with the assignor remaining accountable, there must also be a promise by the assignees to perform. *See* 3 S. Williston, *supra*, § 418, at 101-03.

Paragraph 28 of the contracts is not the sole evidence of this advance consent to delegation of the purchaser's duties. The fact that "Nicholson and/or Assigns" are specifically designated as the "Pur-

Two restrictions, however, qualify this permission. As to the first restriction, each contract contains a typographical error: the purchaser's right to assign only extends "to any partnership of which [sic] is a general partner." Second, a concomitant duty is imposed if an assignment is made: the "Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform" the purchaser's obligations under the contract.[3]

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chaser" in the contracts also discloses this permissive intent. *See* 4 A. Corbin, *supra*, § 871, at 478-79; Restatement (Second) of Contracts § 323 comment b (1981). Likewise, paragraph 21 of both contracts specifying that each agreement is binding on the principals and "each of their respective . . . assigns" is evidence of consent to the delegation of an otherwise nondelegable duty. 4 A. Corbin, *supra*, § 871, at 481; *cf. Little Rock Surgical Co.* v. *Bowers*, 227 Mo. App. 744, ____, 42 S.W.2d 367, 369 (1931); *In re Frayser's Estate*, 401 Ill. 364, ____, 82 N.E.2d 633, 638 (1948); *Baum* v. *Rock*, 106 Colo. 567, ____, 108 P.2d 230, 234 (1940) (conclusive evidence of intent). Additionally, the evidence presented during trial indisputably showed that during negotiation of the contracts, both parties anticipated that limited partnerships to be formed by Nicholson and Ariko would take over the contracts.

[3] The Restatement (Second) of Contracts § 328 (1981) provides that, unless the language or circumstances indicate the contrary, an "assignment of the contract" or of "all my rights under the contract" is not only an assignment of the assignor's rights but also a delegation of his unperformed duties under the contract; acceptance of such an assignment by an assignee is presumed to be a promise to perform the assignor's unperformed duties. *But cf. Hahn* v. *Earth City Corp.*, 625 S.W.2d 640, 643 (Mo. App. 1981) (unclear if Missouri accepts this presumption). An exception to this rule of construction exists, however, when a purchaser makes an assignment of a contract for the sale of land. Analogous to the situation where land is sold "subject to" a mortgage, no promise to assume the vendee's duties by the assignee is implied merely from the acceptance of the assignment without the presence of other circumstances indicative of such intent. *Hahn* v. *Earth City Corp.*, 625 S.W.2d 640, 643 (Mo. App. 1981); Restatement (Second) of Contracts § 328 comment c (1981); *see Senn* v. *Manchester Bank of St. Louis*, 583 S.W.2d 119, 127 (Mo. 1979) (en banc); *State ex rel. Hoyt* v. *Shain*, 338 Mo. 1208, ____, 93 S.W.2d 992, 997 (1936); *Futrall* v. *Triplett*, 84 F.2d 861, 863 (8th Cir. 1936).

Initially we must note the difficulties that have arisen when the phrase "assignment of the contract" has been employed. This ambiguous expression has been inartfully used to refer solely to an assignment of rights, solely to a delegation of duties, or to encompass both assignment of rights and delegation of duties. *See* J. Calamari and J. Perillo, *The Law of Contracts* § 18-1 (2d ed. 1977); 4 A. Corbin, *Corbin on Contracts* § 864, § 873, at 494 (1951); 3 S. Williston, *A Treatise on the Law of Contracts* § 407 (3d ed. 1961). However, unless intent to the contrary is shown, a contractual prohibition against "assignment of the contract" is presumed as a matter of law to refer only to delegation of contractual duties, not assignment of rights. *See Charles L. Bowman & Co.* v. *Erwin*, 468 F.2d 1293, 1297-98 (5th Cir. 1972); 4 A. Corbin, *supra*, § 872, at 484; 3 S. Williston, *supra*, § 422, at 138-39; Restatement (Second) of Contracts § 322(1) (1981). A contract provision expressly permitting assignment of the contract, as in paragraph 28, should likewise be so construed. Beyond the use of the phrase "right to assign this Agreement" in paragraph 28, no intent is shown that the restrictions contained in the paragraph apply to assignment of the purchaser's rights under the contracts. The clause does refer to "such assignee or transferee," but the addition of these words cannot be said to clarify the parties' intent.

These contract rights were freely assignable to the two limited partnerships. No material change in the sellers' duty to convey title to the realty or chance of receiving return performance occurred by these assignments of Nicholson's rights as purchaser under the contracts. *See* Restatement (Second) of Contracts § 317(2)(a) (1981). Such assignments were anticipated, and the

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Paragraph 28, with its provision that the assignee "shall in writing expresly assume and agree to perform" the purchaser's duties, clearly reveals the intent necessary to overcome this exception. Whether the phrase "right to assign this Agreement" in paragraph 28 was intended to refer to assignment, delegation, or both, *see* 4 A. Corbin, *supra*, § 864; 3 S. Williston, *supra*, § 407, a promise by the assignees to perform the purchaser's duties is mandated by the terms of each contract.

assignor Nicholson, whether or not a general partner of each assignee, would remain liable on the notes. *See Missouri Pacific Railroad Co.* v. *Rental Storage & Transit Co.*, 524 S.W.2d 898, 906 (Mo. App. 1975).

Alternatively, even if the phrase "right to assign this Agreement" in paragraph 28 is construed to apply to an assignment of rights, no intent is thereby shown to eliminate the *power* to assign the contracts in violation of the restrictions. The Restatement (Second) of Contracts § 322(2) (b) (1981) states the general rule that "[a] contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, ... gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective . . . ." Most significantly for purposes of this appeal, neither the form nor terminology of paragraph 28 purports to clearly bar the power to assign or to invalidate an assignment not made in compliance with the restrictions. Merely the "right to assign," not the power to assign, is limited by the express language of the clause. No intent is thereby revealed to avoid an assignment not meeting the restrictions.[4] *See Detroit Greyhound Employees Federal Credit Union* v. *Aetna Life Insurance Co.*, 381 Mich. 683, ____, 167 N.W.2d 274, 277-78 (1969); 4 A. Corbin, *supra*, § 873, at 494.

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[4] One recognized commentator has pointed out that a contractual provision forbidding or restricting an assignment of rights under the contract may take any one of at least three distinct forms. J. Murray, Jr., *Murray on Contracts* § 306, at 623 (2d rev. ed. 1974); G. Grismore, *Effect of a Restriction on Assignment in a Contract*, 31 Mich. L. Rev. 299, 299-300 (1933). Only one of these forms reveals the intent necessary to preclude the power to assign or to cause an assignment violative of contractual conditions to be wholly void. Such a clause must contain express provisions to the effect that any *assignment* shall be void or that any assignment shall be invalid if not made in a certain specified way. *See Allhusen* v. *Caristo Constr. Corp.*, 303 N.Y. 446, ____, 103 N.E.2d 891, 892-93 (1952); 3 S. Williston, *supra*,

Other portions of the contract likewise do not reveal any intent to affect the validity of an assignment in violation of the contracts. To the contrary, other contractual provisions, such as the specification of the purchaser as "Nicholson and/or Assigns," and the clause binding the principals and their "assigns,"[1] as well as the circumstances surrounding the negotiation and execution of these contracts, strongly support the inference that paragraph 28, if it was intended to apply to an assignment of rights, was not intended to preclude the power to assign in violation of the restrictions.

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§ 422 n.6, at 130; J. Murray, Jr., *supra,* § 306, at 623; G. Grismore, *supra,* at 299-300; *cf. Silliman* v. *Chrisman,* 584 S.W.2d 441, 447 (Mo. App. 1979); *Portland Elec. and Plumbing Co.* v. *City of Vancouver,* 29 Wash. App. 292, ____, 627 P.2d 1350, 1351 & n.1 (1981).

If the contract provides that an assignment will make the *contract* void, the assignment is effective but the nonassigning party has the right to avoid the contract for breach of a condition precedent to his duty to perform. J. Murray, Jr., *supra,* § 306, at 623. On the other hand, the contract may contain only a promise by one or both parties to refrain from assigning or a promise to assign only under certain conditions. The promise creates a duty in the promisor but its breach does not render the assignment ineffective. *Hanigan* v. *Wheeler,* 19 Ariz. App. 49, ____, 504 P.2d 972, 975 (1972); *Murray First Thrift and Loan Co.* v. *Stevenson,* 534 P.2d 909, 911 (Utah 1975); J. Murray, Jr., *supra,* § 306, at 623; 3 S. Williston, *supra,* § 422, at 130-31 & n.6; G. Grismore, *supra,* at 300. If a breach of such a promise goes to the "root" or "essence" of the contract, the other party would have the option to avoid the contract on the basis of breach of a constructive condition. If such breach is not material, however, the other party merely would have an action for specific performance or for damages for breach of contract. G. Grismore, *supra,* at 300; *see* Restatement (Second) of Contracts §§ 225, 237, 241 (1981).

Although paragraph 28 is an affirmative grant of permission to delegate, these three conceptual distinctions are equally applicable and helpful in analyzing its effect since the permission it grants is subject to restrictions.

[1] See *supra* note 2.

We thus hold that these assignments are valid and that the assignee partnerships have standing to sue in this case as the real parties in interest. *See* Mo. Ann. Stat. § 507.010 (Vernon 1952).

Avoidance of the Contract.

Moreover, the sellers cannot successfully urge that they can avoid the contract on the ground that express conditions precedent to their duties were not fulfilled or that the assignments were a material breach of the contracts. The sellers initially dispute the assignments on the ground that there were no written promises from the assignees to comply with the stipulation that "Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform" all the purchaser's duties under the contracts. Although there was no actual writing by the assignees,[6] we find that a valid and binding promise to assume the purchaser's duties can be implied from the conduct of the assignee partnerships. Even though an assumption of duties by the assignees is not presumed merely from acceptance of the assignment of these contracts,[7] the assignees may show intent to bind themselves by their actions, such as by suing for specific performance of the contracts as the assignee partnerships originally did here. *Epstein* v. *Gluckin*, 233 N.Y. 490, ____, 135 N.E. 861, 862 (1922) (Cardozo, J.); Restatement (Second) of Contracts § 328 comment c (1981); *see United Brick & Tile Co.* v.

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[6] It is readily apparent that the writing itself was not the operative goal under this restriction; rather, the writing was only a means to an end. *See* 3A A. Corbin, *supra*, § 650, at 114.

[7] See *supra* note 3.

McKissick, 51 F.2d 67, 69 (8th Cir.), *cert. denied*, 284 U.S. 677 (1931); *Kneberg* v. *H. L. Green Co.*, 89 F.2d 100, 103 (7th Cir. 1937).[8]

The sellers here obtained what they bargained for, although in a different form from that specified by contract. The object of the restriction requiring a written promise has been accomplished. *See Cheney* v. *Bilby*, 74 F. 52, 64-65 (8th Cir. 1896). The stipulation of a written promise is at most a condition of the purchaser's "right to assign." Such a condition may be excused without other reason if its requirement will involve extreme forfeiture or penalty, and its existence or occurrence does not form an essential part of the exchange for the promisor's performance. *Cessna Aircraft Co.* v. *Aviation, Inc.*, 243 F.2d 815, 819 (10th Cir. 1957). The absence of a written assumption of duties thus does not give these sellers the option to avoid the contracts for violation of an express condition precedent to their duty to convey.[9]

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[8] Other courts have held that assignees of a contract for the sale of land impliedly assume duties if they accept the assignment with notice of a provision within the contract that it is binding upon assigns. *See* 3 S. Williston, *supra*, § 418A n.16 (citing cases). In any event, when it is unclear whether an assumption as well as a delegation of duties has occurred, the mere presence in the original contract of a clause to the effect that assigns are bound is strong evidence of intent of assumption when there is an "assignment of the contract." 4 A. Corbin, *supra*, § 871, at 481; *cf. Kneberg* v. *H. L. Green Co.*, 89 F.2d 100, 103 (7th Cir. 1937) (the clause does not of itself impose an obligation on assignee, but gives him an option to be bound).

[9] The distinction between a mere promise or assurance that future performance will occur and a condition precedent to the duty of the other party is based upon intent. 3A A. Corbin, *supra*, § 633, at 32. The law does not favor conditions which cause forfeiture, *see Miran Inv. Co.* v. *Medical West Bldg. Corp.*, 414 S.W.2d 297, 304 (Mo. 1967); 3A A. Corbin, *supra*, § 635, and thus courts will not construe

Furthermore, construing this provision as a promise that a written assumption would be made if the contracts were assigned, we find substantial compliance existed. *See Gundaker* v. *Templer,* 560 S.W.2d 306, 309-10 (Mo. App. 1977). Nicholson did not make the written assignments to the partnerships until June 8, 1979; the partnerships did not file certificates of limited partnership with the state until June 13, 1979; the sellers declared the purchasers in default on June 14, 1979. The purchasers did not have a reasonable time before the contracts were terminated in which to deliver written promises to assume. Moreover, under the circumstances of this case, a written document evidencing an assignee's intent to assume was "merely an act to be performed in fulfillment of the ultimate contract objective, sale of the property and payment of the purchase price," and would have been a "routine element commonly attaching to the closing" of the sale of these properties. *Cohen* v. *Crumpacker,* 586 S.W.2d 370, 375 (Mo. App. 1979). Since the closings were never held, the assignee partnerships showed clear intent to assume the purchaser's duties within a reasonable time. *See* Restatement (Second) of Contracts § 204 (1981); 3A A. Corbin, *supra,* § 716. Thus substantial compliance with this restriction existed and there was no breach of a constructive condition of the contracts. *See Pasquel* v. *Owen,* 186 F.2d 263, 269-70 (8th Cir. 1950). The sellers are limited to merely seeking damages, if they can prove any, for breach of the restriction requiring a written assumption of duties.

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contract provisions to be conditions precedent to another party's duty under the contract unless "required to do so by plain, unambiguous language or by necessary implication." *Kansas City S. Ry. Co.* v. *St. Louis-San Francisco Ry. Co.,* 509 S.W.2d 457, 460 (Mo. 1974); *see* 5 S. Williston, *supra,* § 665. Words of condition, such as "upon condition that" or "provided" are not conclusive to distinguish between intent to create a condition precedent to another party's duty to perform and intent to merely covenant or promise. *Green County* v. *Quinlan,* 211 U.S. 582, 594 (1909); *Southern Surety Co.* v. *MacMillan Co.,* 58 F.2d 541, 547 (10th Cir.), *cert. denied,* 287 U.S. 617 (1932).

The sellers also contend one assignment is defective because Nicholson is a limited partner, not a general partner, of one of the assignee partnerships in violation of the restriction that "Purchaser shall have the right to assign this Agreement to any partnership of which [sic] is a general partner." We find that, under the circumstances present here, the sellers cannot use this stipulation to avoid their contractual duties on the basis of either an unfulfilled condition precedent or a breach of a constructive condition inferred from a promise.

In the Wellington Green Apartments' partnership, Nicholson is the general partner as well as one of the limited partners; John Ariko is the "initial limited partner" and one of the regular limited partners. In the Cedar Point Apartments' partnership, their roles are reversed so that Nicholson is not specified as a general partner.[10]

The trial court specifically found that Ariko as well as Nicholson had participated fully in the negotiations. 527 F. Supp. at 606. Both Nicholson and Ariko testified that before the execution of the contracts they discussed with the sellers the possibility that their roles as general partner and special limited partner might be reversed for financing purposes in one of the assignee partnerships to be formed. Both reported the sellers' response to be merely that they had done the same thing themselves on occasion. The testimony of Thomas Barken, associate of DRG and sellers' local sales agent, is also in accord on this point. Bill Bruce, one of the sellers, conceded in testimony that it probably would not make any difference to him as seller whether Ariko or Nicholson was a general partner.

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[10] Despite the different nomenclatures applied to Nicholson's status in the partnerships, Nicholson, as either general partner or "initial limited partner," shares in 4% of the general profits and losses and 33.33% of the profits from major capital events in both partnerships. Ariko, on the other hand, as either general partner or "initial limited partner," shares in only 1% of the general profits and losses and 16.67% of the profits from major capital events in both partnerships.

Additionally, in paragraph 16(b) of each contract, the seller warrants "[t]hat Seller understands that various divisions and subsidiaries of Purchaser, and officers, principals and stockholders thereof may be involved in this transaction as real estate brokers, mortgage brokers, general partners, limited partners, or agent or principal for the sale of mortgage-backed securities." Moreover, the F.H.A. commitments, applied for by DRG after the execution of the contract, list the proposed mortgagors on the projects as "Anthony J. Nicholson & John G. Ariko, General Partners, Partnership to be formed."

The evidence thus overwhelmingly supports the conclusion that John Ariko was intended by all the parties as a possible general partner of one assignee partnership. Although insertion of the word "it" into the deleted portion of paragraph 28 of both contracts would probably allow the paragraph to be read the way it was originally drafted, we find that such an interpretation clearly fails to express correctly the understanding reached by the parties as to the permissible structure of the limited partnerships. Whether we employ a process of interpretation, including the rule construing doubtful provisions against the drafting party, *Eastmount Construction Co.* v. *Transport Manufacturing & Equipment Co.*, 301 F.2d 34, 41 (8th Cir. 1962); 3 A. Corbin, *supra*, § 559, or employ the vehicle of contract reformation to correct a mistake in the written expression of the parties' agreement, *J.E. Hathman, Inc.* v. *Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 268 (Mo. 1973) (en banc); *Edwards* v. *Zahner*, 395 S.W.2d 185, 189-90 (Mo. 1965); Restatement (Second) of Contracts §§ 155, 156 (1981), the sellers cannot avoid their duties under these contracts on the ground that Nicholson was not explicitly made a general partner of one assignee partnership when the evidence of the parties' true intent is so one-sided.[11]

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[11] This conclusion does not prejudice the sellers. Nicholson remains personally liable on the performance of the contract as the original purchaser and assignor. *Missouri Pac. R. R. Co.* v. *Rental Storage & Transit Co.*, 524 S.W.2d 898, 906 (Mo. App. 1975). With Ariko

The Contract Benefits.

In an alternative finding, the district court held that, even if the limited partnerships did have standing, they could not claim the benefits of the contracts because they failed to meet the June 14, 1979, closing date. 527 F. Supp. at 610. The court reasoned that the sellers only partially waived the purchasers' initial breach when they accepted the late down payment. It held that the sellers conditioned further contract performance on a closing date on or before June 14, 1979, the originally scheduled expiration date of the F.H.A. commitments.

Paragraph 14(a) of both contracts stipulates that the closings on the sale of the apartments are to occur contemporaneously with the closings on the F.H.A.-insured loans.[12] At the time

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designated as general partner of one partnership, the sellers in fact have increased their security; Ariko by such partnership formation subjects himself to personal liability beyond his ownership as a limited partner. *Compare* Mo. Ann. Stat. §§ 359.090, 358.150 (Vernon 1968) *with* Mo. Ann. Stat. § 359.070 (Vernon 1968). Additionally, because of Nicholson's control over the disputed partnership, the purchasers have a strong argument in their contention that Nicholson would be found by a court to be a general partner as a matter of law. *See Filesi* v. *United States*, 352 F.2d 339, 341 (4th Cir. 1965); Mo. Ann. Stat. § 359.070 (Vernon 1968); *see also Garbo* v. *Hilleary Franchise Systems, Inc.*, 479 S.W.2d 491, 497-98 (Mo. App. 1972).

[12] Paragraph 14(a) states:

> *Time.* Settlement (closing) hereunder shall take place contemporaneously with the closing of the insured mortgage loan contemplated by Paragraph 10 hereof, and if the closing of the sale contemplated by this Agreement shall not have occurred on or before the expiration of said commitment through a failure or refusal on the part of Purchaser to perform its obligations hereunder, then this Agreement shall be null and void and of no further force or effect and the deposit made pursuant to paragraph 4 hereof shall be paid to seller free and clear of any and all claims or rights of Purchaser.

Paragraph 27 of each contract provides: "*Closing.* The reference herein to closing means the closing held in which the first mortgage note is endorsed pursuant to the FHA conditional commitment attached hereto as Exhibit 'B'."

these contracts were executed, the parties did not have firm commitments form the F.H.A. to insure the first mortgages, and thus did not know the expiration date of such commitments. When the firm commitments were issued on March 16, 1979, they were scheduled to expire June 14, 1979, unless an extension of time was granted.[13]

After the sellers rejected Nicholson's letter of credit and demanded contract compliance by May 16, 1979, Nicholson protested the sellers' action by telegram and concluded: "It is my intent to close the contracts within the FHA commitment deadline of June 16 1979 . . . ." This telegram was sent two days before Nicholson mailed the personal checks for $40,000 to DRG on May 17. When these checks were accepted and the sellers authorized DRG to proceed to closing, neither DRG nor Nicholson were expressly informed by the sellers of any conditions attached to acceptance of the delayed deposit. On May 22, 1979, shortly after Nicholson had sent the checks which were cashed, Joseph Baron, attorney for the purchasers, sent a letter to DRG confirming the intent and ability of the purchasers to close the sale and stating: "Said closings will be accomplishd prior to the scheduled expiration of HUD's commitments to insure."

At the time of these declarations by Nicholson and Baron concerning the closing date, the scheduled expiration date on the loan commitments happened to be June 14, 1979. On June 8, 1979, however, an extension of the loan commitments was requested by DRG.

We do not find sufficient evidence to support the sellers' contention and the trial court's finding, *see* 527 F. Supp. at 607,

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[13] The F.H.A. commitments both stated: "This commitment shall expire 90 days from date of commitment, unless duly extended in writing by the Commissioner and upon such expiration all rights and obligations of the respective parties shall cease."

that sellers were "induced and persuaded to proceed with the deal" by representations from Nicholson and his attorney that closing would occur on or before June 14. As phrased, the statements by Nicholson and Baron concerning a closing date clearly do not reveal intent to offer new concessions to the sellers as compensation for the purchasers' breach of the deposit stipulations in the contracts. Both statements merely tracked the terminology employed in paragraph 14(a) of the contracts in reference to the then scheduled expiration date of the commitments. Such statements only show agreement to do that which the purchasers were already legally liable at that time to do. *See In re Windle,* 653 F.2d 328, 331 (8th Cir. 1981); *R-Way Furniture Co.* v. *Powers Interiors, Inc.,* 456 S.W.2d 632, 637 (Mo. App. 1970). There is not any evidence to show that both parties agreed that acceptance of the delayed checks would be conditioned on a closing date on or before June 14, rather than on or before the expiration date of the commitments. *See Nicholls* v. *Kammerich,* 626 S.W.2d 653, 656-57 (Mo. App. 1981); *Campbell* v. *Richards,* 352 Mo. 272, ____, 176 S.W.2d 504, 505 (1944). Moreover, there was not a writing to modify the express terms of these contracts for the sale of land. *See Three-O-Three Investments, Inc.* v. *Moffitt,* 622 S.W.2d 736, 740 (Mo. App. 1981); *Gee* v. *Nieberg,* 501 S.W.2d 542, 544 (Mo. App. 1973); *John T. Brown, Inc.* v. *Weber Implement & Automobile Co.,* 260 S.W.2d 751, 755 (Mo. 1953). We thus find that the sellers voluntarily and unconditionally waived Nicholson's default under the deposit provisions of the contracts when DRG accepted and retained the personal checks for $40,000 and the sellers instructed DRG to continue to proceed toward closing. *See Three-O-Three Investments, Inc.* v. *Moffitt,* 622 S.W.2d at 740-42; *Plymouth Securities Co.* v. *Johnson,* 335 S.W.2d 142, 152 (Mo. 1960); *Johnson* v. *Farrow,* 594 S.W.2d 655, 658 (Mo. App. 1980); *Domyan* v. *Dornin,* 356 S.W.2d 70, 72 (Mo. 1962); 3A A. Corbin, *supra,* §§ 723, 755.

We also find that the contract closing date was effectively extended beyond June 14, 1979, when DRG, as agent of the sellers, requested and was granted an extension of the expiration date of the F.H.A. firm commitments. The purposes of the contracts and the language of paragraph 14(a) concerning closing did not mandate that the contract closings occur on or before June 14, 1979, once that was no longer the expiration date on the commitments. The financing arrangements under which these apartments were to be sold made it imperative that closing occur on or before the expiration of the F.H.A. firm commitments to insure the loans. Because the F.H.A. program made the transaction possible, time was of the essence. Paragraph 14(a) of the contracts reveals the parties' clear intent that closings on the sales and the loans would take place contemporaneously either on or before the expiration date of the commitments. *See Cochran* v. *Grebe,* 578 S.W.2d 351, 353-54 (Mo. App. 1979); *Johnson* v. *Schuchardt,* 333 Mo. 781, ____, 63 S.W.2d 17, 19 (1933). Significantly, the very terms of the F.H.A. commitments, incorporated into both contracts, contemplated possible extensions of the originally scheduled expiration date. When DRG extended the expiration date on the commitments, the contract parameters concerning time for performance were also extended in accordance with the plain language and express stipulations in the agreements. *See Standard Title Insurance Co.* v. *Union Pacific Insurance Co.,* 364 F.2d 287, 289 (8th Cir. 1966); *O.A. Talbott & Co.* v. *Byler,* 217 S.W. 852, 853 (Mo. App. 1920).

Until June 18, 1979, when DRG was discharged by the sellers, it was expressly authorized to act as the sellers' agent in all phases of application for the F.H.A. mortgage insurance commitment and to also act as F.H.A.-approved mortgagee.[14]

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[14] This finding of the trial court, 527 F. Supp. at 606, is based on an agreement entered on January 12, 1978, by Bill Bruce on behalf of the sellers with DRG.

Although the sellers were unhappy with the extension of the expiration date, they are bound by this act of their agent. Whether or not the extension request was actually authorized by the sellers, an issue disputed by the parties, DRG was cloaked with broad apparent authority to bind the sellers on all matters pertaining to the F.H.A. applications, including the extension. *See* Restatement (Second) of Agency §§ 8, 145 (1958). The sellers in fact, in a letter to DRG, stated that they were terminating the relationship on the ground that DRG "had previously agreed to act as our agent" but "the principal thrust of . . . [DRG's] . . . efforts have been to serve the interest of the buyer under contract."

The fact that DRG may have been a dual agent does not change this result. DRG was authorized to act in its various capacities with the knowledge and consent of both parties. *See Macalco, Inc.* v. *Gulf Insurance Co.*, 550 S.W.2d 883, 895 (Mo. App. 1977); *Burton* v. *Pet, Inc.*, 509 S.W.2d 95, 100 (Mo. 1974). DRG was not guilty of any misconduct, nor can it reasonably be said that it acted adversely to the sellers' interests or tortiously when it extended the expiration date. *See Thomason* v. *Miller*, 555 S.W.2d 686, 688 (Mo. App. 1977); *Cossairt* v. *Reich*, 370 S.W.2d 291, 295 (Mo. 1963); *Fuchs* v. *Leahy*, 321 Mo. 47, ____, 9 S.W.2d 897, 900 (1928). Both the purchasers and sellers had contract duties uncompleted at the time of the extension request;[11] both could reap possible benefits from an extension of the expiration date. *See Dillard* v. *Rowland*, 520 S.W.2d 81, 91 (Mo. App. 1974).

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[11] In a June 14, 1979, letter, David Dempsey, an attorney for the purchasers, advised the sellers that closing could not occur at that time, because, among other reasons: (1) the sellers failed to authorize DRG to sell the GNMA Securities on the open market, thereby establishing the discount points the sellers were to pay, or in lieu thereof, the sellers failed to obtain agreements from their existing mortgagees to accept GNMA Securities; (2) the sellers failed to authorize the existing mortgagees to release to the purchasers or DRG

Because the deposit breach was totally waived by the sellers and because the closing date on the contracts was effectively extended by sellers' agent, the purchasers cannot be denied the benefits of these contracts on the ground that they were the first to violate its terms. We find that the sellers wrongfully repudiated these contracts on June 14 when they declared a default under paragraphs 14(a) and 14(b) of the contracts. The sellers' actions given the purchasers a claim for damages for total breach. Restatement (Second) of Contracts § 253(1) (1981).

The district court held, 527 F. Supp. at 610, that even if the contract date had been extended to July 16, 1979, the purchasers would still be precluded from recovery because they failed to appear for closing on June 29, 1979, the date for closing set by their own attorney, and failed to demand that the seller close prior to July 16 when the F.H.A. commitments would expire.

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the amounts necessary to pay off the existing deeds of trust; and (3) the sellers failed to complete certain interior repairs on the Wellington Green Apartments and as a result the HUD inspection of these apartments could not be completed.

On the other hand, the sellers asserted that the purchasers had not submitted necessary documents to the F.H.A. in time for closing to occur June 14. The sellers also claimed, and the district court agreed, 527 F. Supp. at 608, 610, that purchasers had a duty to give sellers fifteen days notice of the date of closing, and if such notice had been given, the repairs would have been completed by June 14. The contract language in paragraph 14(b) that this court finding is based on, however, states: "*Place.* Settlement or closing hereunder shall be conducted by a person or firm designated by Purchaser, such designation to be by notice in writing given Seller not less than fifteen (15) days prior to closing hereunder." This provision merely requires that the agent to act for purchasers at closing be designated at least fifteen days before closing. An agent of DRG, Clyde Frame, admitted it was his responsibility to give the notice under this provision to the sellers. In May 1979 the agent had written contract with Joseph Baron, purchasers' attorney, concerning the closing, and so presumptively had knowledge of the closing agent's identity. Moreover, in light of our holding that the contract closings were effectively extended past June 14, 1979, no notice was required before the end of May 1979.

We find, however, that the sellers' total repudiation relieved the purchasers of any further contract duties. A tender by one party is waived where the other party declares a repudiation of the contract or takes any position which would render tender a "vain and idle ceremony." *Miran Investment Co.* v. *Medical West Building Corp.*, 414 S.W.2d 297, 303-04 (Mo. 1967); *see M.K. Metals, Inc.* v. *Container Recovery Corp.*, 645 F.2d 583, 588 (8th Cir. 1981); Restatement (Second) of Contracts §§ 253(2), 255 (1981). Likewise, the effect of a repudiation is not changed if the other party to a contract urges the repudiator to retract his repudiation or to perform despite his repudiation. Restatement (Second) of Contracts § 257 (1981).

We thus reverse and remand this case for further findings in accord with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1006-C (C)

John G. Ariko, as General Partner for Cedar Point Apartments, Ltd., a Limited Partnership,

Plaintiff,

v.

Cedar Point Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as a General Partner in Bruce Properties Company, a Partnership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard II, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard II, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Gershman Investment Corporation, an Arkansas Corporation,

and

Community Federal Savings and Loan Association, a Corporation,

Defendants.

No. 79-1008-C (C)

Anthony J. Nicholson, as General Partner for Wellington Green Apartments, Ltd., A Limited Partnership,

Plaintiff,

v.

B & D Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Parntership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard I, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard I, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Missouri Savings Association, a Corporation,

Defendants.

JUDGMENT

Findings of Fact and Conclusions of Law dated this date are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of each defendant and against the plaintiffs in Cause No. 79-1006-C (C) and Cause No. 79-1008C (C). These causes are dismissed with prejudice.

DATED this 30 day of October, 1981.

J. H. Meredith
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1006-C (C)

John G. Ariko, as General Partner for Cedar Point Apartments, Ltd., a Limited Partnership,

Plaintiff,

v.

Cedar Point Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as a General Partner in Bruce Properties Company, a Partnership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard II, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard II, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Gershman Investment Corporation, an Arkansas Corporation,

and

Community Federal Savings and Loan Association, a Corporation,

Defendants.

No. 79-1008-C (C)

Anthony J. Nicholson, as General Partner for Wellington Green Apartments, Ltd., A Limited Partnership,

Plaintiff,

v.

B & D Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Parntership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard I, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard I, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Missouri Savings Association, a Corporation,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court for a decision on the merits after trial to the Court. After consideration of the pleadings, testimony and exhibits introduced at trial, the parties' briefs and the applicable law, the Court makes the following findings of fact and conclusions of law. Any finding of fact equally applicable as a conclusion of law is adopted as such, and conversely, any conclusion of law equally applicable as a finding of fact is so adopted.

Findings of Fact

1. Cedar Point Apartments, Ltd., in Cause No. 79-1006-C (C) is a limited partnership organized and existing under the laws of the state of Florida. The Certificate of Limited Partnership was issued by the Florida Secretary of State on June 13, 1979. John G. Ariko, a citizen of the State of Florida, is its sole general partner and has brought suit herein in such capacity.

2. Wellington Green Apartments, Ltd., in Cause No. 79-1008-C (C), is a limited partnership organized and existing under the laws of the State of Florida. The Certificate of

Limited Partnership was issued by the Florida Secretary of State on June 13, 1979. Anthony J. Nicholson, a citizen of the State of Florida, is its sole general partner and has brought suit in such capacity.

3. Defendants Bill L. Bruce, Donald R. Ham, Donn H. Lipton and Patricia Ferer are citizens of the State of Missouri.

4. Defendants Robert M. Millard and Christina Ferer Millard are citizens of the State of New York.

5. Defendants B & D Investment Corporation and Cedar Point Investment Corporation are corporations duly organized and existing under the laws of the State of Missouri. Defendants Donald R. Ham and Bill L. Bruce are and have been since incorporation, the sole shareholders, directors and officers of each corporation.

6. Defendants Bill L. Bruce and Donald R. Ham are, and have been since formation, the sole partners of a partnership organized and existing under the laws of the State of Missouri, to-wit: Bruce Properties Company.

7. Wellington Green-Cedar Point is a limited partnership organized and existing under the laws of the State of Missouri. Its Certificate of Limited Partnership was executed on December 24, 1974 and was recorded with the Recorder of Deeds for St. Louis County, Missouri, on March 19, 1975. Its general partners from the date of organization to present are defendants Bill L. Bruce and Donald R. Ham. From December 24, 1974 to June 13, 1979, its limited partners were Harold B. Huhn and Nannett R. Huhn. On June 13, 1979, an Amended Certificate of Limited Partnership was executed, and from and subsequent to that date, the only limited partner of said partnership has been defendant Donald R. Ham. The amendment to the Certificate of Limited Partnership was filed with the Recorder of Deeds for St. Louis County, Missouri on June 14, 1979.

8. The Certificate of Limited Partnership of Wellington Green-Cedar Point at all times states that:

> "The character and purpose of the business of the limited partnership shall be to acquire, own, hold, manage, rent, lease, mortgage, encumber, and otherwise deal with certain parcels of real property, which parcels are hereinafter decribed, known as WELLINGTON GREEN APARTMENTS and CEDAR POINT APARTMENTS, and to do all other things necessary or incidental to such purposes."

9. Defendant McDonnell Douglas Corporation is and was a corporation duly organized and existing under the laws of the State of Maryland with its principal place of business in the State of Missouri.

10. In Cause No. 79-1008-C(C), defendant Missouri Savings Association was and is a corporation organized and existing by virtue of the laws of the United States with its principal place of business in the State of Missouri.

11. In Cause No. 79-1006-C (C), defendant Gershman Investment Corporation is and was a corporation duly organized and existing by virtue of the laws of the State of Arkansas with its principal place of business in the State of Missouri.

12. In Cause No. 79-1006-C (C), defendant Community Federal Savings and Loan Association was and is a corporation duly organized and existing by virtue of the laws of the United States with its principal place of business in the State of Missouri.

13. From January 11, 1979 to August 10, 1979, defendant B & D Investment Corporation in Cause No. 79-1008-C (C) held record title to the real property known as the Wellington Green Apartments, whose legal description is correctly set forth as follows:

A tract of land in the Southwest 1/4 of SECTION 6, TOWNSHIP 46 NORTH, RANGE 7 EAST, and described as follows: Beginning at the Northeast corner of property conveyed to St. Louis County, Missouri by deed recorded in Book 4525 Page 619; thence along the North line of said property, North 89 degrees 29 minutes West, 416.90 feet to the Northwest corner thereof in the East line of Property conveyed to Laura H. Schmitt and husband by deed recorded in Book 503 Page 163; thence along said East line, North 1 degree, 28 minutes East, 168.71 feet to the Northeast corner of said Schmitt property; thence along the North line of said property, North 89 degrees 29 minutes West, 104.3 feet to the Northwest corner thereof; thence North 1 degree 28 minutes East, 1831.40 feet to a Southwestern corner of property conveyed to Orville Behle by deed recorded in Book 3956 Page 464; thence along the Southern line of said Behle property, South 34 degrees 37 minutes East, 649.50 feet and South 64 degrees 22 minutes East, 110.5 feet to the Southeast corner thereof; thence South 0 degree 02 minutes East, 1421.78 to the point of beginning.

On August 10, 1979, by general warranty deed, Defendant B & D Investment Corporation purported to transfer all of its right, title and interest in said real property to the Wellington Green-Cedar Point, a Missouri limited partnership. Said warranty deed was recorded with the Recorder of Deeds for St. Louis County, Missouri on August 14, 1979.

14. From January 11, 1979 to August 10, 1979, defendant Cedar Point Investment Corporation held record title to the real property known as the Cedar Point Apartments, whose legal description is correctly set forth as follows:

A tract of land in U. S. Survey 110, Township 46 North, Range 7 East, and described as follows: Beginning at the intersection of the North line of Chambers Road and the

East line of Crown Point Drive, said East line also being the West line of U. S. Survey 110, thence along the East line of Crown Point Drive, North 8 degrees 17 minutes 04 secords East 1049.78 feet to a point in the center line of creek; thence along the center line of said creek the following courses and distances: South 15 degrees 54 minutes 45 seconds East, 22.23 feet, South 81 degrees 12 minutes East, 49.82 feet, North 82 degrees 47 minutes East 114.25 feet, North 24 degrees 38 minutes East 39.05 feet and South 78 degrees 13 minutes East 74.61 feet to a point in the West line of Pepper Lane Amended Subdivision as per plat book 73 page 36, thence along the West line of said Pepper Lane Amended Subdivision, South 1 degree 05 minutes East, 1045 feet to a point in the North line of Chambers Road, and thence along the North line of Chambers Road, the following courses and distances, North 89 degrees 57 minutes West, 407.01 feet to a point, North 0 degrees 03 minutes East, 5 feet, North 89 degrees 57 minutes West, 10 feet, South 0 degrees 03 minutes West, 5 feet and North 89 degrees 57 minutes West, 12 feet to a point of beginning according to survey by Volz Engineering and Surveying Co. during April 1971, now known as CEDAR POINT, as per plat thereof recorded in Plat Book 139 page 53 of the St. Louis County Records.

On August 10, 1979 by general warranty deed defendant Cedar Point Investment Corporation purported to transfer its right, title and interest in said real property to the Wellington Green-Cedar Point, a Missouri limited partnership. Said warranty deed was recorded with the Recorder of Deeds for St. Louis County, Missouri on August 14, 1979.

15. On August 20, 1979, the plaintiff in Cause No. 79-1006-C (C) filed with Recorder of Deeds for St. Louis County, Missouri, a Notice of Lis Pendens. The Notice of Lis Pendens was recorded with the Recorder of Deeds for St. Louis County, Missouri, and is recorded in Book A-8, page 315-316.

16. On August 20, 1980, the plaintiff in Cause No. 79-1008-C (C) filed with the Record of Deeds for St. Louis County, Missouri, a Notice of Lis Pendens. The Notice of Lis Pendens was recorded at Book A-8, page 313-314.

17. On January 12, 1978 Bill L. Bruce entered into an agreement on behalf of Bruce Properties Company with DRG Financial Corporation whereby DRG Financial Corporation would act as agent for Bruce Properties in all phases of application for F.H.A. Mortgage Insurance Commitment and whereby DRG Corporation would also act as F.H.A. approved mortgagee in processing F.H.A. insured loans on the Wellington Green Apartments and Cedar Point Apartments projects.

18. On April 7, 1978 Bill L. Bruce on behalf of Bruce Properties Company entered into two agreements with Thomas L. Barken Investment Company, Inc. and DRG Financial Corporation whereby DRG and Thomas L. Barken Investment Company, Inc. were given the exclusive right to sell, assign, and/or exchange Bruce Properties' interests in the Wellington Green Apartments and Cedar Point Apartments.

19. On January 11, 1979, defendants B & D Investment Corporation and Cedar Point Investment Corporation by their duly authorized officer, defendant Ronald R. Ham entered into contracts for the sale of the Wellington Green Apartments and the Cedar Point Apartments to Anthony J. Nicholson and/or assigns. Prior to January 22, 1979, Anthony J. Nicholson executed the same contracts.

20. Prior to the execution of the final contracts for sale of the Wellington Green and Cedar Point Apartments, there had been preliminary negotiation between the sellers (B & D Investment Corporation and Cedar Point Investment Corporation) by defendants Ham and Bruce and Anthony J. Nicholson and John G. Ariko. These preliminary negotiations commenced in October, 1978, and were conducted through DRG Financial Corporation. In the latter part of 1978, Ham, Bruce, Nicholson

and Ariko participated in direct negotiations which had been arranged by DRG Financial Corporation and Thomas L. Barken. At various times during the after contract negotiations, Ham, Bruce, Nicholson and Ariko discussed and agreed that the contracts for the two apartment complexes would be assigned to two Florida limited partnerships to be formed; and that DRG Financial Corporation could act as mortgagee for the purchasers. At that time Anthony J. Nicholson and John G. Ariko personally viewed the properties and were furnished and reviewed various financial documents and records relating to the properties.

21. Paragraph 4 of each contract for sale, specified that the purchaser was to deposit as an earnest money deposit with DRG Financial Corporation the sum of Twenty Thousand Dollars ($20,000.00) for each contract. The earnest money deposit was to be represented by an irrevocable letter of credit in favor of the seller. Further, said earnest money deposit was to be made no later than January 30, 1979.

22. On February 12, 1979, Anthony J. Nicholson tendered two (2) personal checks, No. 2133 and No. 2134, each in the amount of Twenty Thousand Dollars ($20,000.00) to DRG Financial Corporation. Nicholson accompanied his tender with instructions to hold the checks until he gave verbal authorization to cash them. Also on February 12, 1979, Nicholson stated to DRG that he would be offering the sellers a Florida bank letter certifying that the funds for the checks were available upon default. Said checks were never cashed or deposited by DRG Financial Corporation.

23. On March 8, 1979, the Florida National Bank at Orlando issued a letter addressed to Gunner Plake at DRG Financial Corporation whereby the bank stated Nicholson had a line of credit with the bank sufficient in amount to provide for a Forty Thousand Dollar ($40,000.00) advance. The bank agreed to forward Forty Thousand Dollars ($40,000.00) to DRG Financial

Corporation from the line of credit of Anthony J. Nicholson upon notice by DRG Fiancial Corporation to the bank of default by Nicholson under the terms of the sales contracts. In early March, 1979, a representative of Florida National Bank read the letter to Bruce over the telephone. A copy of this bank letter was subsequently delivered to sellers' offices by Thomas Barken, sellers' agent.

24. On May 10, 1979, defendants Cedar Point Investment Corporation and B & D Investment Corporation sent to DRG Financial Corporation a mailgram which stated that they considered the Florida National Bank letter unsatisfactory to meet the requirements of paragraph 4 under the sales contracts, and instructed DRG Financial Corporation to obtain contract compliance.

25. On May 11, 1979 DRG Financial Corporation sent by mail to Anthony J. Nicholson a copy of defendants' May 10th mailgram together with a letter requesting that Nicholson forward to DRG Financial Corporation either a certified check in the amount of Forty Thousand Dollars ($40,000.00) or an irrevocable letter of credit in favor of the sellers by 5:00 p.m. Eastern Daylight time on May 16, 1979.

26. On May 15, 1979, Anthony J. Nicholson sent to DRG Financial Corporation a mailgram in which he protested defendants' request for a Forty Thousand Dollar ($40,000.00) cash deposit on or before May 16 and stated that the Florida bank letter had been accepted by Bill Bruce as complying with the contracts of sale.

27. On May 17, 1979, Anthony J. Nicholson mailed two (2) personal checks, No. 372 and No. 2216, totalling Forty Thousand Dollars ($40,000.00) to DRG Financial Corporation for earnest money deposit on the purchase of the Wellington Green and Cedar Point Apartments. These checks were received by DRG Financial Corporation, subsequently cashed, and the funds were held by DRG Financial Corporation as earnest money deposit up to and until December 5, 1979.

28. Shortly after receiving Nicholson's checks of May 17, 1981, DRG Financial Corporation informed sellers of the receipt of the checks. Sellers' local sales agent, Thomas Barken, informed Donald R. Ham that the funds had been received. Ham then instructed Barken to continue to work toward a closing under the contracts for sale. Sellers also told DRG's Washington agent, Clyde Frame, to proceed to closing under the contract. Sellers were induced and persuaded to proceed with the deal and convey the property to the purchaser Nicholson based upon the representations by Nicholson that closing would occur on or prior to June 14, 1979, the date the commitments to insure were scheduled to expire.

29. A substantial portion of the purchase price provided in each contract was to be funded by notes secured by first deeds of trust. These notes were to be insured by the Federal Housing Administration, pursuant to the provisions of Section 223(f) of the National Housing Act. The balance of the purchase price was to be paid by cash at closing, the earnest money deposit and certain capital surplus notes. Commitments to insure the primary funding were obtained from the Federal Housing Administration and were issued on March 16, 1979. Said commitments, by their terms, expired ninety (90) days after issuance, which was June 14, 1979.

30. On June 8, 1979, DRG Financial Corporation requested the Federal Housing Administration to extend each of said commitments to insure for a period of thirty (30) days. On June 11, 1979 the Federal Housing Authority extended each commitment to insure until July 16, 1979.

31. The extensions to the Federal Housing Administration commitments to insure did not automatically extend the contracts or the time for closing.

32. DRG Financial Corporation, as mortgagee, was to finance the purchaser of the properties through the sale of "GNMA" securities. However, the only demand DRG Finan-

cial Corporation ever made on sellers to furnish commitments in writing from the present lenders or to authorize the sale of the securities on the open market was by letter dated June 13, 1979.

33. Paragraph 14(b) of each contract for sale provided:

> "Settlement or closing hereunder shall be conducted by a person or firm designated by purchaser, such designation to be by notice in writing given seller not less than fifteen (15) days prior to closing hereunder."

The only written notice that sellers received concerning closing was a letter dated June 13, 1979 from David Dempsey, one of purchaser's attorneys, setting closing for June 29, 1979 at the St. Louis HUD office.

34. In order to close the mortgage loans insured by the Federal Housing Administration, the purchaser had a duty to submit numerous documents to the Federal Housing Administration for their review and approval as part of any closing. Said documents included instruments creating the mortgagor entity, deeds of trust, security agreements, a mortgagor's certification as to actual costs, and a financing plan.

35. The purchaser or his representative did not submit all documents to the Federal Housing Administration in sufficient time for the closings to occur on or prior to June 14, 1979. Specifically, the mortgagor's certification as to actual costs and financing plans were not received by FHA until June 18, 1979. In addition, revised notes, deeds of trust, and other documents were not submitted to FHA for its approval until after June 22, 1979.

36. All required FHA repairs on the Cedar Point Apartments had been completed and approved by FHA by June 5, 1979. On June 12, 1979 FHA inspected the repairs on the Wellington Green Apartments and noted in an inspection report that certain interior and exterior items needed completion. The interior items needing completion were minor "punch-type" items. Had

the sellers been given notice on or before May 30, 1979 that closing was set for June 14, 1979, the remaining repairs could have been completed except for those exterior repairs for which FHA would have escrowed sufficient funds to cover the cost of completion.

37. The sellers appeared at the F.H.A. offices on the morning of June 14, 1979. At that time they learned that the HUD commitments to insure had been extended at the request of DRG Financial Corporation and that the purchaser had failed to submit all of the required documents to F.H.A. for review. Late in the afternoon on June 14, 1979, after leaving the F.H.A. offices, the sellers notified DRG Financial Corporation by letter that the contracts were terminated in light of the default by purchaser.

38. Neither the purchaser nor a representative of the purchaser appeared for closing on June 29, 1979 at the regional office of the United States Department of Housing and Urban Development in St. Louis as per the previous notification from the purchaser that closing would occur at that date and place. Neither the purchaser nor a representative of the purchaser ever made demand upon the sellers, orally or in writing, that the sellers honor the contracts and convey the property to the purchaser or his assign, either on June 29, 1979 or at some time prior to the expiration of the commitments to insure as they had been extended to July 16, 1979.

39. Had the purchaser or a representative of the purchaser appeared for closing at the time specified on June 29, 1979 and had the purchaser met all of the obligations under the contracts for sale, B & D Investment Corporation and Cedar Point Investment Corporation were prepared to close and convey title to the purchaser or his assigns on that date.

40. Paragraph 28 of each contract for sale provides:

> "Purchaser shall have the right to assign this agreement to any partnership of which it is a general partner; provided however, that purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform and discharge each and every obligation and liability of purchaser set forth in this agreement."

On June 8, 1979, Anthony J. Nicholson, as purchaser, executed assignments purporting to convey all of his right and interest in the contracts for sale as purchaser to the plaintiffs, the limited partnerships, respectively. At no time have plaintiffs in writing expressly agreed to assume and perform and discharge the obligations and liabilities of the purchaser. The evidence adduced simply showed that the limited partnerships, as purchasers, under the terms of the partnership agreement were authorized and empowered to assume the obligations and liabilities of the purchaser. Plaintiffs' evidence that they were prepared to agree in writing to assume the obligations and liabilities at closing does not comply with the terms and conditions of the contracts for sale.

Conclusions of Law

1. The Court has jurisdiction over these actions pursuant to 28 U.S.C. § 1332 in that there is total diversity of citizenship between plaintiffs and defendants and the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

2. Plaintiffs Cedar Point Apartments, Ltd. and Wellington Green Apartments, Ltd. lack standing to sue on the January 11, 1979 contracts because the assignments of the contracts to them by Anthony J. Nicholson are void. The January 11, 1979 contracts contain express limitations on the power to make assignments. Prohibitions or limitations in a bilateral contract on the right to assign are valid, binding, and enforceable. 6 Am. Jur. 2d, Assignments, § 22. Anthony J. Nicholson failed to

comply with the assignment clause in the contracts in that he never obtained written agreements from plaintiffs that they would perform each and every obligation of "purchaser" set forth in the contracts. Anthony J. Nicholson further failed to comply with the assignment clause in the contract for Cedar Point Apartments in that he is not a general partner in the Cedar Point Apartments, Ltd. partnership.

Plaintiffs have attempted to avoid these defects in the assignments by arguing that the assignment provisions in the contracts do not apply to them. Their argument is based on the language in the preamble to the contracts which defines "purchaser" as "Anthony J. Nicholson and/or assigns." Plaintiffs assert that they are actually "purchasers" within the meaning of this language and therefore that the assignment stipulations do not govern them. There is no basis for this argument. Reading the contracts as a whole, it is apparent that the assignment provisions were intended to apply equally to all assignees, including those taking directly from Mr. Nicholson as "purchaser."

Plaintiffs further argue that even if the assignment provisions do apply to them, those provisions have lost their effect. Their argument is premised on authority which holds that when assignees have rendered full performance on a contract or when such performance is presently offered, contractual stipulations regarding assignments are no longer binding and may not be invoked by defendants to avoid the contract. This rule was applied by the Eighth Circuit Court of Appeals in *Cheney* v. *Bilby*, 74 F. 52, 64 (8th Cir. 1896), *cert. denied* 164 U.S. 705, 17 S.Ct. 992 (1896). It appears to be based on the notion that the purpose of assignment restrictions is to safeguard performance on the part of the purchaser, so that once performance has been assured, the restrictions become of no further consequence. *See, e.g., Lambert Incorporated* v. *Starbrand Sales Corp.*, 422 F.2d 621, 625 (7th Cir. 1970).

The *Cheney* rule is not applicable to this case. Here, purchaser had repeatedly failed to comply with the terms of the contracts. Therefore, sellers lacked adequate assurance that full performance could be given and were entitled to compliance with the assignment stipulations. Such compliance being absent, the assignments must fail.

Finally, plaintiffs argue that the assignment provisions do not bar these actions because those provisions have been waived by defendants. This contention is without support. The record shows that defendants were aware that assignments were contemplated, but they at no time indicated that such assignments would be permitted without the written assurances provided for in the contract.

3. Assuming, *arguendo*, that plaintiffs have standing to bring these actions for the purported breach of contracts for sale, plaintiffs nevertheless cannot claim the contracts' benefits. The purchaser, Anthony J. Nicholson, breached the contracts by failing to deposit irrevocable letters of credit in favor of seller with DRG Financial Corporation on or prior to January 30, 1979. Although purchaser ultimately tendered checks as an earnest money deposit, those checks were personal, not certified. Although purchaser submitted a bank letter, that letter did not constitute an irrevocable letter of credit. Purchaser's personal checks and bank letter thus failed to comply with the specific language and terms of the contracts. Sellers bargained for clear guarantees of payment and were entitled to receive them. They did not.

Although sellers did accept purchaser's late tender of personal checks and the bank letter, that acceptance did not constitute a total waiver of purchaser's breach. Sellers specifically conditioned any further agreement to complete the sales and to convey the property to the purchaser or a valid assignee on the fact that closing occur on or prior to June 14, 1979, the then scheduled expiration date of the F.H.A. commitments to in-

sure. Purchaser again failed to comply. Purchaser did not give the notice required by the contract fifteen days in advance of June 14, 1979, nor did purchaser submit the necessary documents to the F.H.A. in sufficient time for the closing to occur on June 14, 1979.

Purchasers have claimed that by obtaining an extension of the F. H. A. firm commitments to insure until July 16, 1979, DRG Financial Corporation, as agent for sellers, extended the contract date and closing date to July 16, 1979. Such an interpretation is not compelled by the language of the contracts. Even if it were, plaintiffs would nonetheless still be precluded from recovery, because purchaser failed to appear for closing on June 29, 1979, the date set by its attorney, and failed to make demand upon sellers that they close prior to the time the F.H.A. commitments, as extended, expired on July 16, 1979.

The law is well settled that a party to a contract cannot claim its benefits where he is the first to violate its terms. *S. G. Adams Printing and Stationery Company* v. *Central Hardware Company,* 572 S.W.2d 625 (Mo.App. 1978), *Nabato* v. *Sletten,* 560 F.2d 340 (8th Cir. 1977). Because purchaser was the first to violate these contracts, judgment must be entered against the plaintiffs on their claims for damages under the contracts and for specific performance.

4. Likewise, judgment must be rendered against plaintiffs on their claims for tortious contractual interference and civil conspiracy. Where a party has breached a contract, the contract is void with regard to the other parties to it. Accordingly, no action for tortious interference or conspiracy will lie with respect to that contract. *See, e.g., McNamor* v. *Baltimore & Ohio Chicago Terminal R. Co.,* 254 F.2d 717 (7th 1958); RESTATEMENT (SECOND) OF TORTS, § 766, Comment P.

5. Because judgment is being rendered against plaintiffs on the above claims, it is unnecessary for this Court to address the validity of plaintiffs' lis pendens notices.

DATED this 30 day of October, 1981.

J. H. Meredith
UNITED STATES DISTRICT JUDGE